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No. 85-1665

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOSEPH PROBE and RONALD SIMMONS, on behalf of themselves and all other persons similarly situated; ROBERT DANBOM and HARRY VIX, on behalf of themselves and all other persons similarly situated; WILLIAM BAYER and BERT DAVIS, on behalf of themselves and all other persons similarly situated; GEORGE WING, on behalf of himself and all other persons similarly situated; and GARTH BELKNAP and ROBERT RAY, on behalf of themselves and all other persons similarly situated,

Petitioners,

vs.

STATE TEACHERS' RETIREMENT SYSTEM and TEACHERS' RETIREMENT BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Despite this court's ruling in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), should retroactive relief to 1978 be awarded in a case in which a State provided retirement options based in part on sex-related actuarial tables?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Respondents respectfully submit that this case is governed by *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). A petition for writ of certiorari will not serve to review or clarify an important legal issue — the issues in this case have already been determined. There being no reason for review under Rule 17 of the Rules of the Supreme Court. The petition for writ of certiorari should be denied.

ARGUMENT STATING REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari asks this court to go over ground that it has covered once before. This case is governed by *Arizona Governing Committee, etc. v. Norris* 463 U.S. 1073 (1983). The petitioners are asking this court to reverse itself on the issue of retroactivity that was decided in *Norris.*

After three years, this is not the time to reverse *Norris.* Indeed, *Norris* was correctly decided on the issue of retroactivity and it was applied correctly in this case by the Court of Appeals. (*See Probe v. State Teachers' Retirement System*, 780 F.2d 776, at pp. 782-783 (9th Cir. 1986.))

Before *Norris*, there was *City of Los Angeles v. Manhart*, 435 U.S. 700 (1978). It answered some questions. It left

open the answers to many other questions. Its reach was narrow. (*Norris*, at p. 1099, Opinion of Justice Powell.)

In *Manhart*, the following language is found at pages 717-718:

> "[W]e do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to any employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probabe cost of a retirement or death benefit plan. Finally, we recognize that in a case of this kind it may be necessary to take special care in fashioning appropriate relief." (Footnotes omitted.)

The petitioners nonetheless cling to the theory that *Manhart* completely revolutionized the pension and retirement industries and that retroactive relief must be afforded. Obviously, the words of *Manhart*, buttressed by the court's *Norris* opinion, belie that conclusion.

Moreover, this case is much different than *Manhart*. In this case, contributions made by males and females are equal. Of that, there is no argument. Further (aside from the option features), equal benefits are paid out to all retirees based on years of service, final compensation, and retirement age. The issue of sex does not come into play at

all in computing the typical retiree's monthly allowance. It only is a factor under the option system. Finally, the retiree is not locked into the system. He or she may withdraw the contributions made and go into the open market to purchase protection, or anything else for that matter. Such an arrangement was implicitly sanctioned by *Manhart, supra*, at pages 717-718.

In 1983, this court addressed the issue of retroactivity in these pension cases in *Arizona Governing Committee etc. v. Norris*, 463 U.S. 1073 (1983).

In *Norris*, it was held that the use of mortality tables based on sex in an employer's retirement system is a violation of Title VII. However, because of the novelty of this concept, no relief was to be effective until August 1, 1983. And that relief was to be only with respect to *benefits derived from contributions made* after that date. *Norris* is a prospective decision and a prospective decision only. Of course, the Court of Appeals understood and ruled in accordance with the *Norris* decision.

The following is stated at pages 1074-1075 of *Norris* in the "per curiam" order which is the preamble to the court's opinion:

> "The Court holds that this practice does constitute discrimination on the basis of sex in violation of Title VII, and that all retirement benefits derived from contributions made after the decision today must be calculated without regard to the sex of the beneficiary. . . . The Court further holds that benefits derived from contributions made prior to this decision may be calculated as provided by the existing terms of the Arizona plan."

As stated by Justice Powell in his opinion at page 1105 of *Norris:*

> "To approve this (retroactive) award would be both unprecedented and manifestly unjust."

The Justice then went on at pages 1105-1106 of the opinion to note the unfairness of retroactive relief in such cases, how retroactive relief was denied in *Manhart*, how such a remedy would be "disruptive" and "drastic" so as to jeopardize the interest of both the insured and the insurer. He had previously noted at page 1099 the narrowness of the question presented in *Manhart.*

The Justice further noted that unfairness of imposing "unanticipated financial burdens" now "when many states and local governments are struggling to meet substantial financial deficits." He stated that the results would be devastating. (*Norris*, at pp. 1106-1107.)

Further in footnote 12, on page 1107 of *Norris* comes the conclusion from Justice Powell (that is shared by Justice O'Connor at page 1111 of her concurring opinion) that "only benefits derived from contributions collected after the effective date of the judgment need be calculated without regard to the sex of the employee."

Even though, in this case, contributions do not directly define benefits, (benefits are calculated from salary, age, and years of service credit) the principle remains the same. In a defined benefit plan such as STRS, contributions are used to determine service credit and the service credit is a determining factor in the calculation of the retirement benefit. While the mathematics are somewhat different, the legal guidelines are constant. Service credit in STRS is calculated on the ratio of earned salary to earnable salary during the plan year and the contributions paid are based on earned salary. Therefore, all service credit earned after a

specific date is directly related to the contributions paid on a salary earned after that date.

As stated above, the Court of Appeal has correctly applied the *Norris* case to the facts at hand in the instant case. Its decision need not be disturbed.

CONCLUSION

The petition for Writ of Certiorari should be denied. This case does not fit the requirements of Rule 17.

DATED: May 8, 1986

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